UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	Minneapolis, Minnesota October 6, 2016 1:06 p.m.

BEFORE THE HONORABLE FRANKLIN L. NOEL
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(IDR HEARING)

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Okay. This is the Bair Hugger MDL; MDL No. 2666. Let's get everybody's appearance on the record. For the plaintiffs.

MR. BEN GORDON: Your Honor, Ben Gordon for the plaintiffs.

MS. ZIMMERMAN: Your Honor, Genevieve Zimmerman, also for plaintiffs.

MS. CONLIN: Jan Conlin, Your Honor, on behalf of plaintiffs.

MR. ASSAAD: Gabriel Assaad on behalf of palintiffs.

MR. PAREKH: Behram Parekh on behalf of plaintiffs.

MR. HULSE: Good afternoon, Your Honor. Ben Hulse on behalf of the defendants.

MR. COREY GORDON: Your Honor, Corey Gordon on behalf of the defendants.

MS. AHMANN: Bridget Ahmann for the defendants.

THE COURT: Okay. And is there anybody on the telephone?

MS. ZIMMERMAN: No.

THE COURT: No, okay. Sometimes I can tell from my little screen when they are on the phone, but I don't

really know how to read it so. Okay.

So we are here to follow-up on the list of, as I count them, initially were eight issues, four identified by defendants and four identified by plaintiffs, related to discovery, and the purpose of this conversation is to see if we can assist the parties in resolving their disputes and if not, which might require formal briefing, because all I have before me is a spreadsheet, as requested, identifying the issue and a brief statement from each side as to their positions regarding it.

Do the parties have a particular order in which they want to proceed or are you leaving that all up to me?

MR. HULSE: I'd be happy to just proceed in the order of the chart, Your Honor.

THE COURT: Okay.

MR. BEN GORDON: That's fine with us, Your Honor.

THE COURT: All right. So let's start with 3M's issue No. 1 which is that plaintiffs' objection to interrogatories are premature. Mr. Hulse.

MR. HULSE: All right, Your Honor. So this relates specifically to -- and by the way, Your Honor, you probably don't have plaintiffs' actual substantive discovery responses. Would it be helpful to have a copy of those?

THE COURT: I'll let you know as you go through this.

MR. HULSE: All right. Fair enough.

THE COURT: If I need it.

MR. HULSE: And I'll do my best to just recite them. So we asked a couple of interrogatories to get at the key allegations underlying the complaints that relate to general causation. One of them was Interrogatory No. 2 which requested that plaintiffs identify any scientific methodology for ruling out possible causes of infections other than the Bair Hugger system and then in Interrogatory No. 6 we asked them to identify and tell us about any tests or inspections of the Bair Hugger system that are relevant to the issue of causation, general causation. In both cases they did not provide any substantive response, objected to those interrogatories as premature and getting into attorney work product relating to -- and that they would disclose experts at the appropriate time. Clearly we're not entitled to matters that are protected from disclosure at this time in their expert materials, but -- but both concern factual issues that presumably they had facts on at the time that they filed the Complaint.

Now, if they don't have supporting facts for -- in response to Interrogatories No. 2 and 6, they should just say so and we can move on. But right now it seems that they are simply just deferring substantive answers to these critical questions until the time of expert discovery. We

may have additional fact discovery that we would want to do based on those answers; that's why the answers can't wait.

THE COURT: So the interrogatories, and maybe I do need to look at them.

MR. HULSE: Sure.

THE COURT: But just looking from your spreadsheet here, your interrogatories simply ask them to identify scientific methodology, that is, they don't have to explain it or go into it or try to persuade you or anything, just say there is a scientific methodology that we employed, it is X?

MR. HULSE: Right. And I think it identifies a defined term. But it is basically requiring them to provide some information so that we know what they're talking about.

THE COURT: Okay.

MR. HULSE: Would you like copies, Your Honor?

THE COURT: Sure.

MR. HULSE: All right. Would you like an extra copy? Okay.

THE COURT: Ms. Zimmerman.

MS. ZIMMERMAN: Thank you, Your Honor. To begin with, the plaintiffs would like to emphasize for the Court that the obligation the plaintiffs have in these cases and before Your Honor is to prove more likely than not that the allegations that we've made are true. They are not to rule

out all other possible causes -- pardon me -- causes of plaintiffs' theories other than the Bair Hugger system. So to extent that the burden of proof continues to be misstated, we want to make that clarification.

Secondly, we think that the Court's scheduling orders, first in Pre-trial Order No. 4 and more recently as clarified in Pre-trial Order No. 13, govern the disclosure of expert opinions and the methodology underlying those opinions, and we are certainly prepared to, we have retained experts and we will be preparing detailed reports explaining their methodology and the facts supporting the opinions that they offered to this Court. But those -- those disclosures will be provided pursuant to the Court's order, and I believe that the expert reports are then do February 2nd, not now in October.

THE COURT: So what, as I understand the issue, then, before me is whether or not these interrogatories are actually asking for the disclosure of expert opinions?

MS. ZIMMERMAN: That may be, Your Honor.

THE COURT: And you say that it is and the defendants say no, we just want you to identify as a matter of fact any scientific methodology to rule out blah, blah, blah and if you don't have any, as you've observed, that's not the burden of proof the plaintiff has, maybe that's the answer to the interrogatory, but I assume from what

Mr. Hulse says, that's not what you've said. Is that a fair --

MS. ZIMMERMAN: I think that that's fair, Your Honor. I think to the extent that there are two main interrogatory responses that Mr. Hulse identified as problematic, first, the methodology to rule out all other potential causes and then, secondly, whether there are any tests or inspections that we've done, those are two separate issues. I think, in plaintiffs' view, both really get at and are an attempt to conduct expert discovery in an expedited fashion in advance of what the pre-trial scheduling order sets forth. But -- but, you know, to the extent that defendants are asking for something much more general about how this might possibly be done, that, I guess, is not the way the plaintiffs read the request.

THE COURT: Okay.

MR. HULSE: Your Honor, may I clarify one thing about Interrogatory No. 6? That's the one that relates to tests?

THE COURT: Okay.

MR. HULSE: It's not restricted to tests or inspections that have been performed by plaintiffs themselves. It is meant to get at any test or inspections, and that's the way it's written. It does ask about any costs or fees that the plaintiffs have incurred relating to

any tests, that's part of it, but it relates to any tests or inspections.

THE COURT: I got lost there. Say it again.

MR. HULSE: I'm sorry, Your Honor. So Interrogatory 6 states -- it says state whether any tests or inspections have been formed at any time to evaluate, not specifically whether they've been performed by the plaintiffs. So presumably they're aware of tests. You know, they cite studies in their Complaint.

THE COURT: But it doesn't exclude tests performed by plaintiffs?

MR. HULSE: Certainly not. Certainly not. But it's meant to be broader than that.

THE COURT: Okay.

MR. HULSE: Yeah, so.

THE COURT: And I mean, technically, as worded, if they were aware of any testing that 3M has done, they should answer by saying 3M did the following things.

MR. HULSE: Absolutely, Your Honor.

THE COURT: Not that --

MR. HULSE: I understand that, of course, you know, they are reviewing our discovery, including tests that we've produced, and so that may be something they supplement, but to the extent at this point they are aware of tests that are -- they view as relevant to this issue of

general causation in particular, then that's -- ought to be part of their interrogatory response.

THE COURT: Okay.

MS. ZIMMERMAN: And, Your Honor --

THE COURT: Anything else on that point, Ms. Zimmerman?

MS. ZIMMERMAN: If I may, I think that perhaps we would benefit from some additional clarification on what the defendants are seeking from us in this regard. I mean, to the extent the interrogatory is requesting that plaintiffs identify every test not just that we've conducted or that we're aware of but that perhaps that 3M has done or somebody unaffiliated with either 3M or the, you know, any of the other study authors, we just wouldn't be aware of that, so I think that would be both premature and overbroad.

To the extent that defendants are trying to get at some testing we've done, I think that the Court is aware from the presentation we made on science day that we've done some preliminary computation fluids dynamics testing, for example. That testing is going to be detailed further with respect to expert reports. And it is not the instance, at least with respect to our experts, that any of our experts have put something on the internet or on YouTube, for example, that would open them up to an early, premature disclosure of publically shared opinions that may weigh in

on this case or be relevant to discovery in this matter.

THE COURT: Okay. All right. Well, it appears to me that the interrogatory, and just to make sure I'm clear, we're talking about Interrogatories Nos. 2 and 6, correct?

MR. HULSE: That's correct, Your Honor.

THE COURT: Okay. It appears to me that Interrogatory Nos. 2 and 6 do not, in and of themselves, call for the disclosure of expert information. They simply ask the plaintiffs to identify any scientific methodology they contend can be employed to rule out all other possible causes of the injuries you allege other than the Bair Hugger system, and it would seem to me that if the plaintiffs can answer that question if there is such a methodology, they can include in their answer that the answer is irrelevant because that's not a standard that anybody needs to meet, but I think the objection that they're premature is overruled. The plaintiff should answer each of these questions. As to what the answer is, is up to the plaintiffs' lawyers to figure out how to answer them. I don't think it requires them to disclose the content of any such tests or methodology, simply to identify what their position is with regard to that and whether they exist.

Okay. The next matter is 3M's issue No. 2 is plaintiffs' restriction of their discovery responses to documents and information in the possession of the

Plaintiff's Executive Committee. Mr. Hulse.

MR. HULSE: Thank you, Your Honor. We're actually not clear, this is -- objection is spelled out in a number of responses to 3M's request, but it may be one that is applied to all of plaintiffs' responses, both to document production and interrogatories. Plaintiffs' position is that it is too burdensome for them to respond to the interrogatories and document requests which are focussed on this issue of general causation other than from the Plaintiff's Executive Committee. You know, of course, our viewpoint is this is really, they've got an e-mail list, they know who the other plaintiffs' counsel are, it's not that difficult a thing to reach out to the other plaintiffs' counsel in this MDL, all of whom are maintaining the same claims, and say do you have -- and ask them if they have information or documents that are responsive to these interrogatories, and there's no reason they couldn't verify interrogatories as in a position of colead counsel on behalf of everybody .

The reason this is particularly concerning to us, Your Honor may remember this issue of these MedWatch reports. These are medical complaints, adverse event complaints that are being filed with the FDA. They appear to be authored by attorneys. We learned through deposition that at least one of them was apparently authored by

Dr. Scott Augustine who has sort of fomented this litigation and is a competitor of 3M. And so we know that, you know, that plaintiffs have sought extensive discovery on medical complaints and presumably are going to rely on the existence of complaints to say that 3M was on notice and, you know, and didn't do what it should have done and the complaints cumulatively help establish the severity of the issue that they're alleging, and yet the Plaintiff's Executive Committee individually say, you know, that they have no idea where these complaints came from. They clearly are coming, from what we can tell, from lawyers, likely lawyers who are in the mix in these cases, but that's not something we can get at to challenge the credibility of these reports without being able to get discovery from the other plaintiffs' counsel.

And, in fact, there doesn't appear to be any mechanism right now for us to get discovery other than from the Plaintiff's Executive Committee in the general causation phase. And waiting until the bellwether phase is not going to be adequate because that's only going to be able to get us discovery for, you know, for whatever it is going to be for 10, 20, whatever it is, individual cases.

So essentially we have a -- the counsel for a large swath of cases here who appear to be insulated from discovery by this objection, and that's why we're raising

the issue.

THE COURT: Do we have specific discovery requests as to which this is the objection asserted?

MR. HULSE: Yes, Your Honor. And it's, in particular, the request that concern communications with Dr. Scott -- I'll get you the numbers here, Your Honor, of the requests, Interrogatories No. 3 and 8. One, 3 is identify communications with the U.S. Food and Drug Administration and any MedWatch reports submitted by you, defined as all plaintiffs, and your attorneys. And 8 gets at communications with Dr. Augustine and his various affiliated entities.

And we know, and I -- I'll say that the plaintiffs have not produced any communications with Dr. Augustine. They have not logged any communications with Dr. Augustine to the extent they are asserting a privilege. And, Your Honor, of course, was involved in the motion to compel against Augustine back in winter of last year, and Dr. Augustine and his attorney produced a privilege log that showed extensive communications between plaintiffs' counsel, including, including, members of Plaintiff's Executive Committee and Dr. Augustine, his lawyers and other people at Augustine's businesses, and we haven't seen any reflection of that either in production or privilege log, so that's another reason why we're concerned about the narrow approach

that's being taken on these issues.

THE COURT: So it's just Interrogatories 3 and 8, dealing --

MR. HULSE: Yep.

THE COURT: None of the document requests?

MR. HULSE: Yeah, those are interrogatories, and there are associated document requests. Your Honor, but it's not clear to us whether this is also an implicit objection to the other document requests and interrogatories. Because plaintiffs have said, essentially, in these instances, that it's too burdensome. We know they haven't gone out and gotten discovery from other plaintiffs' counsel or other plaintiffs because they've said that's too burdensome, so there's no reason to believe that doesn't apply to all of their responses here.

THE COURT: Okay. Ms. Zimmerman.

MS. ZIMMERMAN: Thank you, Your Honor. As a starting number -- or as a starting point, I think that to the extent that the requests are for information that may have been submitted to the FDA by some unknown party, the defendants could certainly obtain that through a FOIA request.

And to the extent that there is another request, and that's for information from Dr. Augustine, they certainly have demonstrated their ability and interest to

conduct third-party discovery in this instance, and as I understand it, Mr. -- or pardon me, Dr. Augustine has indeed provided a privilege log, and as we understand it, that would be his privilege to invoke.

Now, plaintiffs' lead counsel, and, to my knowledge, everybody on the Plaintiff's Steering Committee, with the exception of one firm, have had no interactions in any regard with Dr. Scott Augustine. There is one firm on the Plaintiff's Executive Committee that was hired by Dr. Scott Augustine, and so to the extent there were communications at one point, that would be something that would be produced on a privilege log, I would assume, by Dr. Augustine.

Now, as a policy matter, the FDA and the regulations governing MedWatch reports actually encourage doctors, members of the public, patients that are harmed, lawyers, manufacturers of defective products to make these reports on a voluntary basis, and the reason for that is so that the FDA and the public can continue to monitor potentially defective products and try to seek out trends.

Now, we have gone to this Court, and we have made many representations, both to defense counsel and before this Court, as officers of this court, that we were not involved in this, and we stand on that. We have not been involved in these MedWatch reports. But to the extent that

the defendants are interested in seeking that information, we think that they could get that from the FDA through a FOIA request.

Secondly, with respect to the defendant's request that they have this information in advance of bellwether cases -- and actually, before I even get there, we have also represented, both to the defendants and in the charts submitted to the Court, that we are willing, and in fact, the e-mail will go out to all counsel of record tomorrow, and we will seek this information to see if there are people beyond the Plaintiff's Steering Committee that have somehow had MedWatch reports or some involvement with that, and we will report back to the Court and defense counsel no later than the status conference next week.

But to the extent that the defendants are asking for or seeking discovery that is going to be relevant in some way to individual cases and bellwether selection, the Court's pretrial scheduling order does not allow case specific discovery to happen until March 2nd. So, again, while we are absolutely willing to and have indicated our interest or willingness to -- to poll the plaintiffs and to report back and to produce any documents that we become aware of, this is, again, premature because this is case specific discovery that is not intended to commence pursuant to the scheduling order until next spring.

MR. BEN GORDON: And Your Honor, if I could add one thing to that just briefly?

THE COURT: Sure.

MR. BEN GORDON: I have spoken to Mr. Blackwell at length about this issue for months and told him explicitly that we have, as the Plaintiff's Executive Committee, talked to counsel around the country in various meetings. Everyone we have had the opportunity to talk to has told us, as we represented to the Court, that they have not made these reports, and the defense knows that. We have not -- no plaintiffs' lawyer we're aware of has made any of these MDR reports to the FDA. They know that. And I think this is a fishing expedition. I think they know who has made these reports. They brought it up at a deposition yesterday.

MR. HULSE: I'm not sure what that means, honestly.

Your Honor, first off, requests, document requests 4 and 25 are the ones where the --

THE COURT: So those are the documents requests that are related to Interrogatories 3 and 8?

MR. HULSE: Correct. 4 relates to communications with regulators and 25 relates to communications with Dr. Augustine. And, again, I want to emphasize the issue here is the objection. If plaintiffs' position is that they have gone to the other plaintiffs' counsel and asked them to

produce, respond to colead counsel responsive documents and responsive information and are satisfied under their discovery obligations that they have done so, that's one thing, but what we have right here is simply an objection.

And also, it is simply not a proper objection that we can go out and subpoena Dr. Augustine for documents that are in the possession of plaintiffs' counsel. Your Honor is aware that we have struggled with Dr. Augustine and his companies and his counsel in getting documents, and it will be -- that issue will be in front of you again in due time.

So it is simply not a proper objection under the federal rules or the case law of this district or any district I've ever seen that you can withhold documents that are reasonably within your possession, custody, control, particularly given the obligations of colead counsel to stand in for all the other plaintiffs' counsel in the case, and you can withhold those documents just because, in theory, the defendants might be able to get them from a third party who has objected strenuously to discovery. And though it's acknowledged and it is right there in the privilege log that we have from Dr. Augustine that there were extensive communications between the Kennedy and Hodges firm and Dr. Augustine and others, we still don't have a privilege log from the plaintiffs as they are obligated to give us in this case. We don't have a single entry on any

privilege log.

But anyway, I've spoken enough on this, Your Honor, and we think that the objection, the burden objection should be overruled.

THE COURT: Okay. It appears to me that as to Interrogatories 3 and 8 and documents 4 and 25 -- I'm sorry, I have one other question for you, Ms. Zimmerman. As I read the response, the last sentence says, "Subject to that objection, please see FOIA requests attached." So have the plaintiffs' counsel made Freedom of Information Act requests to the FDA?

MS. ZIMMERMAN: We did, Your Honor, and we provided those to defendants.

THE COURT: Okay. But have you received anything back yet?

MS. ZIMMERMAN: Yes, we did, and we provided the response. It's a very brief response.

THE COURT: I was going to say.

MR. HULSE: And it was --

THE COURT: Is it a listing of all of these notifications, or what exactly is the -- what did the FDA give you in response to your Freedom of Information Act request?

MS. ZIMMERMAN: Your Honor, that I think what we have from -- we submitted two different FOIA requests. The

first response is I think four or five pangs long and it's not a list of all the MedWatch. I don't think that that is specifically what we asked for. So I guess what our suggestion would be is that to the extent that that's what the defendants are getting at or wanting to get from us, they could submit their own FOIA requests to the FDA requesting MedWatch reports.

THE COURT: Okay.

MR. HULSE: Could I briefly explain what the limitation is on that, Your Honor, is, and a FOIA request is, first off, what you get back is redacted, it doesn't contain information about the submitter and so forth, and what really goes to the credibility of these complaints being submitted to the federal government is the background behind them.

I mean, what we've learned through this deposition yesterday and other discovery is that, you know, Dr. Augustine was behind one of these, and, you know, we're going to be pursuing additional discovery behind that. That's something that we wouldn't have been able to tell merely from getting the documents through a FOIA request from the federal government.

THE COURT: Okay. So it would appear to me that to the extent that plaintiffs' request to Interrogatories No. 3 and 8 and Document Requests Nos. 4 and 25 is that the

requests are overbroad and unduly burdensome, that objection should be overruled.

To the extent that plaintiffs' counsel have only answered those interrogatories and/or document requests as they relate to Plaintiff's Executive Committee, it would appear, to me, that that response is inadequate and that Interrogatories 3 and 8, 4 and -- and Document Requests 4 and 25 should be communicated to all counsel for all plaintiffs, and that, I believe, would fall within the job description of your liaison counsel.

MS. ZIMMERMAN: Sure.

THE COURT: Is that the correct person to communicate -- to coordinate the communication with all of the individual plaintiffs' lawyers and respond on behalf of each of the plaintiffs.

To the extent there are privilege objections asserted, I don't think I have enough information in front of me to actually rule on a privilege. I understand that at least some of these responses include assertion of work product and attorney-client privilege, and I simply don't think there is adequate record for me to render an opinion on that one way or the other.

And as to the -- and as I understand it, what I -- my opinion that I've just expressed is not inconsistent with the plaintiffs' willingness to poll all of plaintiffs'

counsel and to pass on the document requests and interrogatories and produce whatever documents are identified by counsel for all of the plaintiffs and communicate their answers to interrogatories.

Which brings us to 3M's issue No. 3, plaintiffs' objection to disclosing or producing communications with Dr. Augustine on the basis of burden and privilege.

MR. HULSE: And, Your Honor, may I ask --

THE COURT: Do you have more on that?

MR. HULSE: Do you have -- and we've covered probably part of that issue. Whether Your Honor has any direction around when the -- those responses to 3M's requests should be made by?

MS. ZIMMERMAN: Your Honor, as I stated, we're prepared to have that information or the e-mail circulated tomorrow, and we will provide everything that we get back from Mr. Szerlag by when we're in court next Thursday.

MR. HULSE: Absolutely acceptable.

MR. BEN GORDON: With understanding that we can't guarantee we'll get 100 percent response, but we'll do our best.

MR. HULSE: I think it might be helpful to their efforts if there were a deadline is my thought on this.

THE COURT: Okay. So let's -- we'll take Ms. Zimmerman's and Mr. Gordon's undertaking to get the

e-mail circulated within a day and then hopefully the responses will be available by our next Thursday, you're referring to our status conference?

MS. ZIMMERMAN: Yes, Your Honor.

THE COURT: And we'll see where we are at that point.

MR. BEN GORDON: I just might add, Your Honor, just so I'm clear, there are about a hundred counsel I think and 760 cases or so filed, so we will produce everything that we have by next week and the report to the Court, knowing that we will probably have some people who may have not responded yet, but we'll use all our best efforts to get them to respond immediately.

THE COURT: Okay. All right. So now we're on to the next one which is related and overlaps to some degree.

MR. HULSE: And that's correct because it concerns Document Request No. 25 and Interrogatory No. 8, and the only thing that I think it remains, because the burden objection, as we understood it, was the going beyond Plaintiff's Executive Committee is that there is a privilege objection, and what we understand is that there may be, may be, a privilege assertion here over communications between plaintiffs' counsel and Dr. Augustine and his corporate entities. And as I've mentioned and have with me here today, we have a privilege log, we think it's an adequate

log, but a privilege log from Dr. Augustine that does reflect quite a few communications between plaintiffs' counsel and Dr. Augustine, yet we have not received any kind of privilege log from plaintiffs' --

THE COURT: Does the log identify which plaintiffs' counsel he has communicated with?

MR. HULSE: It does. Mr. Assaad and Mr. Hodges.

THE COURT: And it's the same in every case?

MR. HULSE: Yes, indeed.

MR. BEN GORDON: It's just one lawyer, Your Honor.

MR. HULSE: Yes.

THE COURT: And that is the Kennedy firm you reference, Ms. Zimmerman?

MR. BEN GORDON: Yes, Your Honor. Kennedy Hodges.

MR. HULSE: Your Honor, may I hand up copies?

THE COURT: Sure.

MR. BEN GORDON: And by the way, Your Honor, just so it's clear, I think it is, because as Mr. Hulse said, you spoke to this last year, this all happened long before the MDL. This was --

THE COURT: Anything else, then, on this issue, Mr. Hulse?

MR. HULSE: Your Honor, it's just -- it's obviously not only relevant itself but it's important to us in evaluating the sufficiency of Dr. Augustine's responses

to our subpoenas to also get a privilege log from the plaintiffs and to see whether they, in fact, agree with each other on the communications that occurred, and there is no exemption in the privilege log protocol which is PTO-11 for these communications.

THE COURT: Okay. Ms. Zimmerman.

MS. ZIMMERMAN: Thank you, Your Honor. I think that, again, I'd like to emphasize that the vast majority of the lawyers involved for the plaintiffs have had no communication of any kind with Dr. Augustine. And as I've heard this Court remind us before, to the extent that we want the Court to do something, we need to bring a motion. To the extent that defendants have a problem with Dr. Augustine, if they have a problem, I'm sure that they can avail themselves of the Court by bringing a motion to compel, whether it be about the privilege log or something else with respect to the discovery sought from him, but that we are not Dr. Augustine's counsel and we are not responsible for that production.

Further, the Pre-trial Order No. 11 specifically addresses exactly this, and it says that parties do not need to list on a privilege log any documents generated after the filing of the original Complaint in *Walton* that were sent only to or received only from plaintiffs' counsel. So it is plaintiffs' position that we are not required to log any

such communications to the extent that they exist with one firm.

And as this Court was I think presented last year about this time, two courts had previously ruled on this issue with respect to privilege logs and the obligation being on Dr. Augustine. So in addition to the agreement that we reached with respect to pre-trial order No. 11, we think that it would be unnecessary, duplicative to order the plaintiffs to produce -- to manufacture and produce a privilege log here as well.

THE COURT: So just to make sure I'm clear, though, is there -- is it the plaintiffs' position that there are no pre-*Walton* communications between Dr. Augustine and the one lawyer that is on your committee?

MS. ZIMMERMAN: No, Your Honor. I do believe that there are some communications between Dr. Augustine and attorneys at the Kennedy Hodges firm prior to the filing of *Walton*. I -- I am not familiar personally with the extent of those communications. It is my understanding that they appear on a privilege log or that they would appear on a privilege log. I certainly wouldn't be in a position to make such a privilege log, but I believe that Dr. Augustine or his attorney would have done so.

THE COURT: And you haven't, as I understand it, polled counsel across the MDL for any communications they

may have had with Dr. Augustine prior to the filing of the *Walton* case?

MS. ZIMMERMAN: No, we have not. And if the Court would so order that we, in addition to the e-mail from Mr., the liaison counsel, on the interrogatories, if it would be the Court's preference that we formally request information about any such communications with Dr. Augustine, we're certainly happy to include that.

THE COURT: Well, that is one of the ones we just talked about, right?

MS. ZIMMERMAN: Yes.

THE COURT: Isn't that Interrogatory No. 8?

MS. ZIMMERMAN: Yes.

THE COURT: And so that will be in your e-mail?

MS. ZIMMERMAN: Correct.

THE COURT: All right. So anything else you want to tell me?

MS. ZIMMERMAN: No.

THE COURT: All right. So it appears to me that I simply don't have an adequate record to determine whether anything or isn't privileged, and if either party -- if any party wants the Court to rule that something is privileged or is not privileged, that does need to be the subject of formal motion practice with a fuller record and a fuller argument on the issue of privilege.

It does appear to me, however, that any such communications prior to the filing of *Walton* from any lawyer in the MDL should be identified on a privilege log to the extent that the plaintiffs are asserting that there is an attorney-client privilege that covers any particular answer to interrogatory or any particular document that is sought. So if there are any such communications that predate the first filing of the *Walton* case, they should be included on a privilege log. But the Court is unprepared and will not render any opinion on the issue of whether documents are or are not or communications are or are not privileged.

MR. HULSE: Your Honor, may I speak to the point about post -*Walton* communications with Dr. Augustine? Thank you. Plaintiffs' counsel have taken the position that any communications between plaintiffs' counsel and Dr. Augustine post filing of *Walton* are exempted from logging under PT-11. That's definitely not the case. And we -- when we negotiated this, we negotiated specific language in mind that it wouldn't include that.

And if you simply read the paragraph B, it has a very narrow exemption for logging for post-*Walton* communications, and those have to be sent only to or received only from plaintiffs' counsel, and you can look at that log that Dr. Augustine produced and see that none of those communications fall into that exemption.

If that exemption -- if this were written differently, half of the documents on our privilege log wouldn't be there, because we have logged, per the language that plaintiffs negotiated with us, many, many, many documents, hundreds and hundreds of documents, where an attorney is copied or an attorney is the --

THE COURT: I'm sorry.

MR. HULSE: I'm sorry?

THE COURT: Do you have the -- what, it's paragraph 11?

MR. HULSE: Yes, Your Honor.

THE COURT: It's Pre-trial Order No. 11?

MR. HULSE: 11.

THE COURT: 11.

MR. HULSE: Correct.

THE COURT: Do you have that handy?

MR. HULSE: Yes. Just one copy, I'm afraid.

THE COURT: All right. Well, it appears to me that paragraph B certainly covers this. Read in its entirety, "The parties need not list on a privilege log documents generated after the filing of the original Complaint in *Tommy Walton versus 3M Company, et al.*, that were sent only to or received only from plaintiffs' counsel, the legal departments of the defendants or the outside counsel for the defendants in this litigation except for

specific categories of documents agreed to by the parties or as required by court order.

"The parties reserve their rights, however, to request that certain subcategories of privileged documents in these categories be logged. If the parties are not able to reach an agreement on whether such subcategories of documents should be logged, within ten court days of the request, either party may present the issue to the court for resolution using the procedures prescribed by the local rules or by order of the court."

So if there's still a dispute about whether these Augustine communications are or are not covered by this paragraph, it sounds to me like you've got ten court days to do something about it. And I don't know what a court day is, by the way. And the Court issued this order and it is signed by the Court, so I won't say anything other than to observe that the entire United States legal establishment went through a big thing a few years back to change all of the rules and all of the statutes and everything in the world to simply say that a day is a day, whether it's a Saturday, Sunday, holiday, or anything else, it is just a day and it gets counted, so I'll leave that where it is --

MR. HULSE: And I guarantee you, you will not see the phrase "court days" in any further filings.

THE COURT: Well, it is in the Court's order, so

I'm taking responsibility for it.

MR. HULSE: And I just say, Your Honor, that under that definition, certainly as we've applied it to our own privilege log, none of these communications that are on Augustine's log would fall into that category. You have, you know, author Scott Augustine sending communications to David Hodges and Randy Benham. Randy Benham is not counsel for the parties here, he's counsel for Dr. Augustine. So that doesn't fall -- get exempted from logging under this provision. That applies to each and everything under that log.

And plaintiffs phrased this carefully too when we were working on this because what they were very concerned about is just because something was copied to an attorney at 3M, they didn't want to necessarily have it exempted from logging if it was also copied -- you know, you've got ten business people who get sent an e-mail and an attorney gets copied, they wanted that logged. They didn't want it exempted from logging. And so this provision has the same effect on the other side of meaning that their communications with Dr. Augustine also have to be logged. And that's -- it's not the easiest language to parse, but that was basically the reciprocal meaning of this.

THE COURT: I will just leave it here which is what I said before is my opinion that clearly any

communications pre-*Walton* should be logged, because, as I understand it, plaintiffs concede that's the reading, at least that. To the extent you want to argue the need for further logging of communications of Dr. Augustine, that's what the rest of this paragraph is about, and you can make a motion as well as the whatever motion practice is necessary for the actual determination of whether there is any privilege or no privilege governing all of this.

MR. HULSE: Understood, Your Honor. Thank you.

THE COURT: And you can return this to Mr. Hulse. I notice it does have his work product on it so.

MR. HULSE: Thank you.

THE COURT: Thank you. All right. The last item on the 3M issues is issue No. 4 which is plaintiffs' objection to producing documents that are, quote, equally available to defendants, end quote. Mr. Hulse.

MR. HULSE: Thank you, Your Honor. We've specified here in the chart the particular request where this objection is made that where we're concerned. We've touched on some of them already. We've got requests for production No. 22, No. 24, No. 31. Plaintiffs' position is basically if you can go to a regulator or subpoena a third party, then even if it's in the -- the documents are in the plaintiffs' possession, custody or control, they don't have to produce them.

It's not supported by any rule. It's not supported by any case law. We have not taken that position in responding to discovery from plaintiffs. I can't swear we never made the objection, but we have not maintained that objection. Our viewpoint is if you've got a responsive document and it's not privileged, you have to produce it.

THE COURT: What about if they have documents that they got from you?

MR. HULSE: Oh, well, then I -- that's just fine. Nobody would need to produce our own documents back to us. But if they got them from a third party, even if, in theory, we could go get them from the third party, they're in their possession, custody or control and they ought to be produced.

We also don't have here any real specification about what exactly they have so we don't know if we could or could not go get it. So if you're going to say something is equally available, you ought to tell us what it is and where you got it from. But like I said, it seems like the far less burdensome thing is reduce the FOIA requests, reduce the litigation, the third-party subpoenas and practice and give us what you've got.

THE COURT: Okay.

MR. BEN GORDON: Your Honor, we'll make this one easy, I think, as well. We certainly contend that a lot of

the information is redundant, duplicative and not only readily available to 3M but 3M has it. For example, these videos they talk about that are on YouTube are clearly publically available. In fact, they reference some of them on the Blackwell Burke website. These studies and all, they have these copies. But it doesn't seem to me to be consistent with the practice of promoting the efficiency. But if they want us to send them hard copies of things they already have, including videos of these things that they talk about on their website and publically available medical articles, we'll do it if that's what the Court wants.

THE COURT: Okay. And it's part of your position on this was that there are some documents that you actually have already -- that you actually received from 3M. I think we just heard Mr. Hulse says he's not asking you to give those back or --

MR. BEN GORDON: I made note of that.

THE COURT: -- to copy those otherwise identify them, so it is simply anything you got from anywhere else that is responsive to the requests will be produced.

MR. BEN GORDON: We've talked it over, Your Honor, and if that's the Court's order, that's what -- we can do that.

THE COURT: Just to be clear, by the way, before we move on to the next set of issues, when I say this is

what I'm thinking, this is my thing, it's technically not an order of the Court. It's my assist -- my attempt at assisting the parties, and to the extent everybody agrees to do what I've said, it's because you've voluntarily agreed to do what I said. It's not a court order in the sense that if you need to object to it, appeal it, that's not going to happen. It's simply that will -- the consequence of not doing what I say is that somebody needs to make a formal motion and then we'll go through the whole rigamarole.

MR. BEN GORDON: Understood, Your Honor. I think this process has been helpful to us, both sides, and that's one of the reasons we appreciate you taking the time to do this on an informal basis. And based on that, we've evolved in our thinking a little, and we'll produce these documents that we think they already have.

THE COURT: All right.

MR. BEN GORDON: Thank you.

THE COURT: That takes us to the plaintiffs' issues. Plaintiffs' issue No. 1 is CFR/QAV/AIS query streams. Who is speaking to that one?

MR. PAREKH: Good afternoon, Your Honor. Behram Parekh. And there's actually CRM. It's another alphabet soup item that got left off that list. Essentially the dispute is what part of this database they need to review and produce to us, and there's multiple databases. But the

CRM database is the essentially the customer relations system where complaints, queries, things, things from customers come back into 3M. And I believe that also includes sales rep information that's put in there.

MR. HULSE: Correct.

MR. PAREKH: And so our view is if it relates to Bair Hugger, they should be producing it, because it is almost impossible for us to tell what language anybody was using to talk about things related to this case versus things unrelated to this case.

THE COURT: Let me interrupt for a second and ask this question which is I thought, and maybe I -- I guess obviously I did, maybe erroneously, that's what this whole Pre-trial Order No. 12 was about, the whole computer-assisted protocol whereby you're going to teach the machine how to look for documents and then the machine is going to look for them, isn't this the kind of database that you would be running through that protocol?

MR. PAREKH: No. Unfortunately that protocol does not work well for things like database records. That works for documents, e-mails, things like that. When it comes to database records, the way that protocol works is it looks for similarities in language and structure with documents and that algorithm does not carry over into databases. It just doesn't work properly from a technical perspective.

THE COURT: Okay.

MR. PAREKH: So --

THE COURT: So you're still left with doing keyword searches?

MR. PAREKH: You're either left with doing keyword searches or you're left with doing searches based upon the way the database is structured. And in this instance, we just have -- we just found out today the CRM database has a total number of records of 3 to 4 million. But in terms of the ones just related to Bair Hugger, we still don't have a number as to how many records are just related to Bair Hugger.

THE COURT: But is the database sliceable as to Bair Hugger, in other words, Bair Hugger is a category you can look for in this database, just show me Bair Hugger documents?

MR. HULSE: Not really, Your Honor.

THE COURT: Okay.

MR. HULSE: It's a pretty archaic database.

THE COURT: All right.

MR. HULSE: So this is one where, you know, and deferring to Mr. Parekh's argument here, where sort of a freer dialogue might end up helping assisting. These are ones --

THE COURT: Is that agreeable to you to have this

sort of back and forth?

MR. PAREKH: It is, except that we've been asking for information for awhile now.

THE COURT: Okay.

MR. PAREKH: And, you know, essentially just got today some of that information that we've been asking for, for two months.

THE COURT: Okay.

MR. PAREKH: And given the timeframe, you know, for discovery to be completed --

THE COURT: We'll just keep it going. He's got his time and we'll get your time. Go ahead. You're still up. You have the floor, as they say.

MR. PAREKH: So the AIS, we found out, has roughly about 140,000 records related strictly to patient warming devices. The CFR database also has roughly the same number of records. Both of those, we believe, are manageable numbers that they should simply be produced to us. And if the defendants want to go through and, you know, redact out things that they believe are unrelated, that's their burden to do so. But we're perfectly willing to take the entire 140,000 and then do our own searches on them. And until we can do that, we can't agree that, you know, the half a dozen keywords that they think are relevant are going to be the right keywords because these aren't structured in a way

where, you know, there's a set of keywords that people who, you know, must select from. These were free form entries based on people's calls, you know, what a consumer put in, what a doctor called and said and put in. Some of these are, you know, from call centers. Some of these are from sales reps. And nobody was using consistent language. There's nothing that says that consistent language is being used.

And this is incredibly important information for us because it goes to a key issue in the case which is what did 3M know, what did Arizant know and when did they know it and when, you know, when was this available to them, and if we miss records because the keywords don't show up and those records don't show up but they show that, you know, we missed records from 2008, that can make or break issues in the case.

THE COURT: So just to be sure I'm clear, what you're asking, though, is, as I read your requests for relief, it is that the defendant be ordered to produce all communications and complaints in these various databases related to the Bair Hugger system, and I guess that's the question, I'm not sure I understand how they isolate the Bair Hugger system documents from any other documents given what I've just heard about what these databases are.

MR. PAREKH: It's our understanding that the AIS

and CFR databases that can be done with and, therefore, for those two databases, they should produce all the records related to Bair Hugger.

The CRM database, it's our understanding from our view that we can actually do that, I think the parties have a question as to how feasible it is, but our view of the CRM database and the software that they're using says we should be able to isolate out the Bair Hugger-related complaints, either through just a search for bair, a search for hugger and a search for patient warming and a search for product numbers, but those kinds of searches are okay, we think those are fine. It's searches where you're looking for things like filter, germ, bug, those are the keywords that we don't want to have narrowed with.

THE COURT: And what is -- what -- what precise document or discovery requests are governed by -- or covered by this issue? In other words, what is it you've asked for?

MR. PAREKH: I don't have the RFP number, but it was a request --

THE COURT: A document request?

MR. PAREKH: It's a document request. I don't have the document request number. But we asked for all complaints and communications related to the Bair Hugger unit with consumers, and I don't think there's any actual dispute of whether or not --

MR. HULSE: They also had a request for all sources of data relating to Bair Hugger.

THE COURT: Okay.

MR. HULSE: Within the company.

THE COURT: Are you done?

MR. PAREKH: Yes.

THE COURT: Okay. It is this yours, Mr. Hulse?

MR. HULSE: Yep. So this really -- this really has been a question of approach. What we've kept in mind is that under Rule 26(b), what's discoverable is relevant information, and we all agree that a huge proportion of what's in these databases I think we all agree is not relevant, and the customer communications database with it's 4 million entries --

THE COURT: But you agree that some of it is?

MR. HULSE: I absolutely do agree some of it is responsive. And so, I mean, I would suggest based on what I have seen from polling data is that it is 99 percent nonrelevant. So what we have proposed to plaintiffs is essentially given their concern about us manually reviewing for relevance is to take a keyword-based approach. So what we --

THE COURT: Let me interrupt there and ask.

MR. HULSE: Yeah, absolutely.

THE COURT: Do you agree as well that the protocol

identified in Pre-trial Order No. 12 doesn't --

MR. HULSE: Yeah.

THE COURT: -- work for this -- these databases?

MR. HULSE: Yeah, we actually expressly exempted from that protocol.

THE COURT: These kind of things.

MR. HULSE: These kind of things and completely agree it would be unworkable. Would love if it worked, it would make this all simpler. So what we asked plaintiffs for is, hey, just we really don't even care what the keywords are, just, you know, give us a list and here are some ideas and we'll give you the results of that and then take a look of the results of that and decide, well, here are some additional keywords that we want or we're concerned this kind of thing isn't coming up. And it's really -- it's like the pre-predictive coding approach to ESI. So to -- and the -- the only real response we've gotten from this is just give us everything, including the nonrelevant stuff, and we just don't think they're entitled to that. And so we think, and hopefully with the Court's direction, if we can take a keyword-based approach here that we are going to have a successful result that's going to be satisfactory to the parties. We just want plaintiffs to participate in it.

THE COURT: What about plaintiffs' suggestion that

at least with regard to, as I understand it, three of these databases, CFR, AIS and CRM, you can segregate out Bair Hugger related things?

MR. HULSE: We can do that. And with more or less effort depending on the database. That's not really the -- the biggest obstacle. The biggest obstacle is the fact that even isolating to Bair Hugger, I mean, I could give you examples of what the irrelevant stuff is, but it's the, you know, 99 percent of it is going to have nothing to do with the filtration, the airflow, infection issues that are alleged in the case. It's, you know, for customer communications is, you know, I want more -- I want more blankets. A complaint thing could be, you know, the hose is broken and I want another hose. That's overwhelmingly what it is.

And so given the sheer percentage of this that is not relevant but given plaintiffs' legitimate concerns about, like, a manual attorney review of this information and then the burden associated with it, it seems like keywords is the way to go. And we are very open to both a iterative approach to that, that's what we've offered. And also essentially whatever keywords the plaintiff wants us to run, we'll run them.

THE COURT: Okay. I'm sorry, who -- what about the thing that you just -- you come up with the keywords,

why is that not a sufficient?

MR. PAREKH: The problem with coming up with our own keywords is that we don't know how people wrote these things up, and without actually reviewing the records, we don't know what keywords to use. We don't know what --

THE COURT: So what would you do, let's assume that you -- you win the point and they have to produce the entire database, what would you do with it then? You'd --

MR. PAREKH: We'd have --

THE COURT: -- manually read every one?

MR. PAREKH: We'd have paralegals sit through and go through and scan the records and then try and come up with ideas based upon scanning those records of how to maybe, you know, take that 4 million or -- and it's not going to be 4 million because that's the entire CRM database, related to Bair Hugger it's going to be a fraction of that, but we'd scan the 140,000 records, for example, in the AIS database and just scan them one by one. I mean, that's what we do.

THE COURT: I think I understand why the predictive coding may not -- so let me ask a few questions before I embarrass myself. So these databases, I understand it, have a number of fields presumably, correct?

MR. PAREKH: Correct.

THE COURT: But what you're interested in is the

field where somebody types in some narrative words about a Bair Hugger?

MR. PAREKH: Correct.

THE COURT: So why is not that particular field that has the narrative description subject to this predictive coding protocol? Isn't it just like e-mails or any other document where people write things down that the computer can learn? And it sounds to me like what you're saying you're going to manually do what the computer does in the predictive coding world.

MR. PAREKH: It would be great if we could, but in order to do predictive coding, you generally need a longer set of documents, you know, a document that's multiple pages, in order for the computer system to learn. Most of these records are going to be a sentence, maybe, and the computer is not sophisticated enough to really be able to pick that up and sort it that way at this stage of the technology. Five years from now we probably will be there, but we're not there yet.

THE COURT: Okay. All right. Anything else on this issue, then?

MR. PAREKH: No, Your Honor.

MR. HULSE: No, Your Honor.

THE COURT: Well, here's what I would suggest we do. Well, let me, before I go any further, one more

question for --

MR. PAREKH: Sure.

THE COURT: How many manual documents would you and your staff need to review to come up with concepts as to what kind of searches you would want to do? Would a hundred be enough?

MR. PAREKH: I don't think --

THE COURT: A thousand?

MR. PAREKH: -- a hundred would be -- probably a thousand to 2,000 records per database, and we'd want them randomized through a period of time. Some of these databases cover many, many years. CRM I think is, I mean, it's, like, ten years or something like that, and so the language that people use changes between, you know, what people were using in 2008 versus 2010 versus 2014.

THE COURT: Okay.

MR. PAREKH: But, I mean, the basic objection is that we will be getting records that aren't relevant to the case, and we just don't feel that there's any real basis for that to be --- you know, I mean, they don't have a obligation --

THE COURT: But the rule --

MR. PAREKH: -- to produce them.

THE COURT: The rule says you're only entitled to relevant evidence.

MR. PAREKH: Correct. But we don't think that in a burden analysis, the fact that we're getting some records that are irrelevant I don't think really matters.

THE COURT: Okay. Question for 3M.

MR. HULSE: Mm-hmm.

THE COURT: What is -- is it possible to generate a dataset of a thousand documents that are responsive, meaning not technically responsive but responsive to the broader request, so that yes, these all are Bair Hugger related entries, what's entailed in doing that?

MR. HULSE: It's possible. The random part is the tricky part. What you could do is, you know, export the whole dataset and then you could take, in theory, like the first X number of entries which should be essentially random but otherwise to -- there's no way the system can randomize it. Otherwise you could have a person who simply just pick a certain number of entries kind of blind. Maybe you can even use a random generator number to do it. But it's doable.

I would suggest if that's the approach Your Honor is going to suggest that that would be an excessive number given the quantity of nonresponsive and nonrelevant information that would be produced, but I think -- I think general -- I mean, we'd certainly be open to providing a sample set from these databases that would allow

plaintiffs to come up with their keywords.

THE COURT: Okay. So let me ask one last question. As to the plaintiffs' last point that if the only objection is that they're going to get documents that are not relevant so they're going to get a bunch of my pipe is broke or whatever it is.

MR. HULSE: Yep.

THE COURT: Hose is broken or I need more blanket kind of requests, why is that so burdensome? Why is that a thing?

MR. HULSE: Well, why is it burdensome? It's -- and the objection is relevance to it, and the way I understand Rule 26(b) is that you don't get into that -- that weighing for nonrelevant information, so it's -- you consider --

THE COURT: Right. But that's --

MR. HULSE: -- burden against degree of relevance.

THE COURT: As I understand it, the problem is your problem; in other words, they've requested relevant documents.

MR. HULSE: Right.

THE COURT: So you're saying, okay, well, we've got this database of stuff.

MR. HULSE: Right.

THE COURT: That contains some relevant documents

but it also contains a lot of non-relevant documents.

MR. HULSE: Overwhelmingly.

THE COURT: And so in the olden days that would mean you would have to assign an army of paralegals to sit there in the warehouse and go through the file cabinet and pull out each of those documents that is relevant and not produce those that are not relevant, but now we don't have warehouses and we don't have paper, we have these databases.

MR. HULSE: Right.

THE COURT: So isn't it now your burden to figure out how to separate the relevant from the not relevant in the database and if the answer is, gee, it's going to -- the easy answer for us, the cheap answer, the more efficient answer is we might have to disclose some nonrelevant information, is that -- isn't that your problem, not the plaintiffs?

MR. HULSE: I -- I think that's a fair point, Your Honor. I would say that in the world, of course, of ESI where you can't do predictive coding, keyword is the next best approach typically when we're dealing with vast troves of information like that, and keywords has been an accepted approach for combing through ESI.

I think, you know, and we actually for the CRM database did run a search term and provide some examples, and I think it is -- the keywords are quite effective at

getting at the relevant information. And if the, you know, when the plaintiffs see the output of the keywords, I think they'll agree with that. You know, the issue here is, in this litigation, is -- is surgical infections, efficacy of filtration, disruption of operating room airflow. It's not that obscure set of issues that can't be reached with keywords for this dataset.

THE COURT: Okay. So here's what I would suggest we do. That the defendants produce to the plaintiffs 1,000 documents per database at issue, select it however you select them, and then the plaintiffs will use those 1,000 documents per database to come up with their list of keywords that should be run against the entire database. If that works, great. If it doesn't, someone make a motion and we'll come up with a smarter solution.

MR. PAREKH: Your Honor, can we get a deadline, so same --

THE COURT: Sure. How long does it take to generate a thousand documents per database?

MR. HULSE: I -- I think we can do this on a rolling basis over the course of two weeks. I think some are just easier than others to do this for.

THE COURT: Two weeks okay?

MR. PAREKH: That should be fine.

THE COURT: Okay. Two weeks. All right.

Plaintiffs' second issue was the confidential documents used at the depositions. We're going to come back to London in a moment so we're going to skip that and go straight to plaintiffs' issue No. 3 which is customer list 2006 to the present. Who's got that issue? Ms. Zimmerman?

MS. ZIMMERMAN: Thank you, Your Honor. We believe that there's kind of two parts to this, so I'm going to start and then hand this off to Mr. Gordon.

And even before I start, I would like to say this has been very productive from our perspective and I assume from defendant's perspective as well, and we very much appreciate the Court's availability and in working with us on this.

It would be plaintiffs' request that if we do this maybe more often, these in person get-togethers on discovery issues, at least through the close of the general causation discovery because, you know, as Mr. Parekh alluded to and on a couple of other issues, these are things we've been trying to get at for many, many months, and this customer list is a good example.

So what we have requested is to have documents produced to us sufficient to identify each hospital or healthcare facility where the Bair Hugger blankets or devices are either sold or placed for the past ten years. And we know that it's -- documents are available, and I can

give you an example of one, and I don't have a Baits number because these are -- these are spreadsheets, they're Excel files, but this is just the very first page, and this is a customer list from 2014.

MR. HULSE: That's okay. Seen it.

MS. ZIMMERMAN: Okay. So this is, if the Court would like this, it's just the first page of a very long document. Plaintiffs are not requesting that the defendants assemble or otherwise gather together and produce to us a new document for our use in this litigation. We know that these documents already exist because we have them for at least two years. But what we would like to have, and what we had requested in our discovery, was to have them dating back ten years.

There are multiple issues that -- or multiple reasons that the plaintiffs have requested this information. First, as we identify in the chart, this information is helpful for purposes of confirming that the Bair Hugger was, in fact, used. And while I understand and agree that it is plaintiffs' burden to have done due diligence prior to filing a Complaint, this kind of information is certainly in the defendant's hands, and it is going to be helpful to the plaintiffs and especially to the plaintiffs' lead counsel as we help serve as gatekeepers to, you know, inappropriate filings.

Second, and more appropriate -- or more relevant for us, our experts have requested this information because there are a variety of different government databases or other databases maintained by various health insurance companies or healthcare facility chains, and the information about which facilities are, in fact, customers of Bair Hugger and when is very relevant as they use this, for example, the NIS, which is the National Inpatient Sample, it's a database that's put forth by the government, the data that's available there is very, very relevant to our experts, and these particular documents about which hospitals and healthcare facilities use Bair Hugger at what times is necessary for their purposes so --

THE COURT: Well, for what, I guess? How -- what is it relevant to? What is your expert going to do with this database -- or these government databases that you're talking about and how is what you're looking for here going to relate to what they're doing with the government database?

MS. ZIMMERMAN: Well, for example, Your Honor, from an epidemiologist standpoint, to the extent that their report may track trends and infections nationally speaking and then drill down on particular hospitals to see are the infection rates at one hospital going up or going down, what are the different factors that come into play, and the fact

that they're -- that that particular hospital is a Bair Hugger user is very relevant to the epidemiologists that we're working with as they try to understand one of the potentially relevant factors that might explain that. So that is one of the reasons.

And we have been seeking, I guess, that this discovery was initially served April 1st. And I guess circling back to the point that to the extent we're able to leverage the Court's availability, we appreciate the opportunity.

Mr. Gordon had some remarks as well about this request.

MR. BEN GORDON: And just related to this, Your Honor, and it may not be articulated as such in our chart, and I hope you'll indulge me just for a moment in spite of that, but it is something that has come up in relation to the locations of these Bair Hugger machines with the Court, both in chambers back as far as April with Mr. Blackwell saying that he needed a formal request to get the Bair Hugger machines which we then gave him first by letter and then by two successive specific formal requests for different models, including models of Bair Hugger machines that were used machines, machines that had real life experience in operating rooms for testing, inspection and testing by our experts. To this date, they have stymied our

efforts to get those.

And they have complete unilateral access to these machines. The hospitals tell us that they don't own the machines; that they either lease them or they sell them to them with some kind of provision that they cannot, you know, if they get rid of them, they have to return them to 3M. So the machines they did respond to and produce, were, we presume, we believe, were virgin machines or refurbished machines that do not have any real world experience in the operating rooms. And so both for purposes of understanding where the hospitals are that were using their machines, which models of machines, because there are different models of machines at issues at different points in time for different plaintiffs in this MDL, and when they stopped using the machines and what happened to those machines that were removed from the hospitals, we are completely at their mercy to give us that information so that the experts can evaluate where the machine -- where the Bair Hugger machines were in use, when that changed, why it changed, and how can we, for our experts, receive machines that actually were in hospital settings that were in use.

And, again, Your Honor, timing for us -- for this last request is of the essence because if we don't have the machines for testing, our experts cannot complete the process that they're going to be required to complete for

their reports, as you know, by I think it's February 1st.

THE COURT: Are there outstanding requests for precisely that?

MR. BEN GORDON: Yes, Your Honor.

THE COURT: And that's not part of this --

MR. BEN GORDON: I believe -- I guess I'm trying to bootstrap it to this, to be frank, Your Honor. I do believe it is related, and we have -- but I suppose a motion to compel would be in order.

THE COURT: But you anticipate a dispute about the other request because you're not getting -- nobody is showing up at your door with a bunch of machines for you to test.

MR. BEN GORDON: Right, Your Honor. And they, in fact, to the contrary, have told us that they either don't have them or don't have access to the used machines, I presume because they're in hospitals. But we have no way to get them. If anybody can get them, they can. And, in fact, we know of specific hospitals I could name that have stopped using the Bair Hugger machines, and those machines have gone somewhere, presumably back to 3M, and what -- the point is we don't want our experts to just get a bunch of scrubbed or brand new machines. I think we have a right and an obligation to test actual machines that were in hospitals.

THE COURT: Okay. Mr. Hulse.

MR. HULSE: Well, it sounds like this is a different issue than the one that was presented to the Court, and I would prefer to address it when it is ripe. We have given --

THE COURT: So address the one that's presented.

MR. HULSE: We have given them for free a number of Bair Huggers.

So the customer lists, and I'd actually like to do my own hand off to my own Mr. Gordon over here after my initial comments, there's sort of two -- two criteria that -- or two arguments plaintiffs make here. One is that they need a complete comprehensive customer list for case vetting purposes. I don't -- I don't think that rationale really holds up. Each and every one of these plaintiffs has pled that the Bair Hugger system was used in their surgeries, presumably that was based upon due diligence by counsel and review of medical records.

To the extent that plaintiffs really have an open question about a particular case, they are absolutely welcome and free to approach us and say, you know, and ask us, was the Bair Hugger system used in this specific hospital, and I'm sure we could oblige such a request, but a request for comprehensive back to 2006 customer lists is simply not needed for case vetting, nor are plaintiffs taking the position that it's relevant for any other issue

other than expert reliance. And that's --

THE COURT: What about that, what about epidemiology?

MR. HULSE: That's where I turn it over to my science counsel here.

THE COURT: Okay.

MR. COREY GORDON: Thank you, Your Honor. I'm the other Mr. Gordon. I -- he's from Florida. I'm from Minnesota.

THE COURT: We've got Gordons. We've got Jerrys.

MR. COREY GORDON: We have two Bens, two Gordons. It gets confusing.

MR. BEN GORDON: Ben and Jerry.

MR. COREY GORDON: And we have Ben and Jerry. Ben and Jerrys. I just want to address the epidemiological question. To the extent that plaintiffs are arguing that, boy, if they had this data, the sales data, they could then use that for an epidemiological calculation of the percentage of Bair Hugger procedures that results in infections, the problem is, they're overselling the extent to which they can gather information about the denominator from government or other databases, but more importantly, there's no way that they can gather the numerator from our sales records.

Now, I'll just briefly explain those two things.

The United States does not collect robust, detailed, surgical site infection data by hospitals by procedures. As some countries do, we don't do it. I wish we did. We -- our data collection system is the subject of lots of discussion and scholarly articles and scholarly handering. It's not very robust. It's very -- it's in gross. So we do have, you know, gross figures. The CDC tracks SSI trends and relies on state collection efforts, but it's -- there's no database you can go to and say, okay, let's see what Abbot Northwestern Hospital is -- how many total hip replacements they did in 2014 and how many surgical site infections they had. Those -- the hospital may have those data and in certain circumstances there may be those data available publically, not very much, but it just doesn't exist on a comprehensive and robust basis.

But even if it did, even if, for example, we could say we know that Abbot Northwestern did a thousand total hips in 2014 and they had four surgical site infections, then the plaintiffs are saying, well, gee, if we had that information, all we need to match it up is to find out if Abbot Northwestern was a customer of 3M and bought Bair Huggers or not. The problem is that sales data from 3M of Bair Huggers, and even Bair Hugger blankets, doesn't tell you which procedures they were used in or not. Individual hospitals, individual surgeons or anesthesiologists may or

may not use the Bair Hugger or the Bair Hugger blanket in every single procedure. Some hospital -- hospital X might buy a thousand blankets and use them at every single procedure. Hospital Y might buy a thousand blankets in a given year but they've -- half of their orthopedic surgeons prefer not to use the Bair Hugger in their hips, the other half do. There's -- there's --

THE COURT: But --

MR. COREY GORDON: Those data just do not exist.

THE COURT: But are hospitals like pubs in the sense that you either are a Budweiser house or you're a Miller house and so you're either a Bair Hugger house or you're some other warming system house or is Bair Hugger kind of the thing and either you use a Bair Hugger or you don't use a Bair Hugger?

MR. COREY GORDON: There are certainly hospitals where it's the hospital practice to be a Bair Hugger facility and that's expected and that's the standard of care, but there are other hospitals where some doctors may order a Budweiser or some may order a --

THE COURT: A HotDog.

MR. COREY GORDON: Yeah, a different type -- some may be teetotalers and not -- fortunately it's getting rarer and rarer, but there are still some surgeons who prefer to do their surgeries without active warming devices. So the

mere fact -- and we -- this is an area I've spent a lot of time in. We know that we cannot say with certainty, just looking at sales records, okay, you know, we sold, you know, 5,000 blankets to Abbot Northwestern, well, therefore, they necessarily used them in all of their arthroplasties. It -- we -- we have to go to Abbot Northwestern or the sales representative has to go to Abbot Northwestern and say, are you using these in all of your arthroplasties? And the hospital may not even be able to say definitively yes, because, you know, a research hospital, you know, an institution has a very strict protocols maybe but a private hospital, that, you know, that has different private docs with admitting privileges, it just --

The point is, these data do not allow for that kind of straightforward analysis. And I, frankly, I wish they did. It would make things a lot easier. But they don't. And so providing this information, this robust discovery of all the hospitals we sell to, that -- that's not going to help their experts in deriving a number that means anything.

THE COURT: Is part of your defense going to entail any epidemiologic studies showing the widespread use of Bair Huggers and some minuscule amount of infections or is that not part of your defense?

MR. COREY GORDON: Only -- well, only in gross,

and that's precisely the problem I'm talking about. For example, the CDC has fairly good data where they account for a lot of the important confounding factors, and so, for example, we know that from 2008 to 2014, the SSI rates in total knees went down 41 percent. We also know that between 2008 and 2014, sales of Bair Hugger, in gross, went, you know, way up. Is that -- it's very crude epidemiology, but it's --

THE COURT: Is it epidemiology on which you intend to rely?

MR. COREY GORDON: It's hard to say because it -- we know that -- we have expert reports disclosed in *Walton* and *Johnson* cases, and one of the experts disclosed there tried to do that kind of crude analysis to show that the -- as Bair Hugger rates -- sales went up, so did SSI rates, and, in fact, the opposite is true, so it would be more in the nature of rebuttal.

The problem is, as I'm saying, it is -- it's gross. It's -- it's a crude -- the numbers are fairly crude. There are epidemiological studies that have looked at various aspects, and, as you're going to hear, they're, in England, they are undertaking a what will be a robust randomized clinical trial that will really look at these things in a rigorous and scientific way. That doesn't exist right now. So the --

THE COURT: Okay.

MR. COREY GORDON: The data on -- the gross sales data, how many blankets that we've sold, I believe we've already provided that. But to the extent that that's what they're seeking, that's not a problem. It's the hospital by hospital stuff that they're asking, and that --

THE COURT: Right. But it's -- I guess where I'm coming from with my question is if you're going to say as Bair Hugger sales went up, infections went down, it seems to me it's fair for the other side to say oh, wait a minute, let's look at hospital by hospital, let's see where these -- if it turns out yeah, you're selling a lot of Bair Huggers but the infection rates are actually come down in the HotDog houses, not in the Bair Hugger houses.

MR. COREY GORDON: That -- and I totally agree, if there was a way to do that. Those data don't exist. They don't exist on either side of the equation, on the hospital by hospital infection rates or the Bair -- you know, again, just -- obviously to the extent that Bair Hugger -- that 3M sells a lot of Bair Hugger blankets to hospital X, there's certainly an inference that they use those blankets in all of their procedures and including their hip and knee. And I guess the one exclusionary thing is if hospital Y didn't buy a thing from 3M, you could probably say, well, then they're probably not using Bair Huggers so their infection rate

would be of some interest, but, remember, the -- much of the literature upon which the plaintiffs rely says the problem is with forced air warming. Bair Hugger is not the only forced air warming unit in the marketplace. It's the dominant one, but it's not the only one. So the fact that we don't sell to hospital Y doesn't mean that it doesn't use a forced air warming device. And to say, well, see, they have a low rate and, you know, that's lower than, it just --

THE COURT: Okay. Thank you.

MR. COREY GORDON: Thank you.

THE COURT: Ms. Zimmerman or who wants the last word on this?

MS. ZIMMERMAN: I hope I can --

MR. ASSAAD: Me.

MS. ZIMMERMAN: You know, I think that to draw the Court's attention back to the way we framed the issue, the plaintiffs are asking for documents sufficient to identify the customers, and when we say "customers," sometimes these units, as we understand it, are sold, sometimes they're placed. What we're not asking for is the actual sales data, although we don't believe that's confidential and some of it has been produced. Rather, what we're asking for is the customer list by year, so not the number of blankets but the actual, in 2009, HCMC, Regions, you know, Fairview Ridges,

and when Fairview Ridges stopped using it or Ridgeview or whichever the hospital is locally, but so, you know --

THE COURT: What about standalone outpatient surgical clinical things, are those customers or is it individual doctors --

MS. ZIMMERMAN: Yes.

THE COURT: -- or is it always going to be some institution?

MS. ZIMMERMAN: Your Honor, I think it depends. I mean, I think it's usually an institution, but there are certainly day surgery centers and I think that there are also individual clinics where they may do an outpatient procedure where, whether it's a Bair Hugger blanket or a Bair Paws gown that's used, that these are used in a variety of different healthcare facility settings.

So I think that to the extent that defendants disagree with what we think the -- can be extrapolated from the data, they will have the opportunity to challenge that through the Daubert process. Our experts tell us that they -- that there are databases that are going to be helpful and that this information is critical for them.

And I think that that's -- and the last thing I would say is that to the extent that we could go serve third-party discovery requests on 760-odd hospitals for the plaintiffs that have filed so far, that would be cumbersome

and terribly inefficient when we know that this data already exists in the defendant's hands, and so we would suggest that that burden not be placed on hospitals across the country.

THE COURT: Okay. Well, it appears, to me, I am unpersuaded that the information regarding customer lists is relevant to claims or defenses in the case and therefore I would not order its production, which is not to say that on a more robust record and perhaps with some more hard data regarding what plaintiffs' experts really want to do with this information that I might not reach a different conclusion, but right now it would appear to me that defendant's objection is well-founded.

Which brings us to plaintiffs' statement No. 4 which is the restoration of tapes. Mr. Parekh.

MR. PAREKH: So this is changed as of this morning when I got an e-mail from Mr. Hulse, and Mr. Hulse has now stated that 3M is in the process of going through these tapes with a vendor and extracting, at least determining what is on them.

Again, we have an issue of timing where, you know, we've known about the existence of these tapes since August and 3M has just apparently started this process. I think you said two weeks?

MR. HULSE: About a month ago. After this --

MR. PAREKH: No, I'm sorry, in order to get the results.

MR. HULSE: Right. Our vendor tells us one to two weeks to get the index.

MR. PAREKH: To get the index. I mean, we would respectfully request that that be a deadline and that we get a copy of the index so that we can see what's on them and then that we can make a determination on whether or not that information is relevant.

THE COURT: Okay.

MR. HULSE: And it's true, Your Honor, after we submitted this issue, we went to our vendor to do a further cost evaluation of what would be involved. We actually have some doubts that there's anything on these tapes. But anyway, because it was less costly than we thought, we just told them to go ahead. This vendor, Iron Mountain, of Iron Mountain fame, has been slow, slower than we would like, but we're now at the point where they tell us it will take one to two weeks to get the index.

We believe that what the index will show is that this is duplicative of the other e-mail sources that we've already produced, including restoring Arizant's e-mail server, but then clearly the parties can have a more informed discussion about it based on the index. So all I'd ask is not to impose a date, just because it's not in my

control, but we are keeping the fire lit under this vendor.

THE COURT: All right. So I guess where I would leave this one is report back next week when we meet for our status conference if you've got your index, or if not, we'll figure out what more the Court collectively needs to do.

MR. HULSE: I'll tell them, Your Honor, that the Court is eagerly awaiting this index.

THE COURT: And the --

MR. HULSE: See what difference that makes.

THE COURT: And tell them you're going to be compelled to report something --

MR. HULSE: I will indeed.

THE COURT: -- on next week. Okay.

That brings us back to London. Who went to London? Okay. So as I understand it, the plaintiffs' request, as we sit here, is for costs and fees, together with travel expenses, for the two of you to go to London for the depositions, none of which occurred. Who wants to speak to that?

MS. CONLIN: I will.

THE COURT: One who wasn't there.

MS. CONLIN: No. And I was happy to see that Your Honor had received the stipulation because it was the first time I had e-mailed the Court and was worried about whether it would actually get through. So I think that the

stipulation that has been submitted by both parties with respect to the U.K. depositions sort of spells it out, and I would just add a couple of other things. We have let 3M take the lead in communicating with these third-party witnesses, and we even talked with them about the fact that they came to us and said would you split fees, you know, if the witness wants any, you know, costs or fees associated with testifying, would you split those with us. We said absolutely but we want equal time as well, which was agreed to.

So the -- and, you know, I understand what they said about the three depositions that were beyond their control, but our folks wouldn't have been in the U.K. at all if they hadn't scheduled Dr. Harper for Wednesday which caused them to fly in Tuesday night and 3M made the strategic decision to cancel that deposition. That was a deposition where they had agreed in advance that we would have equal time and we had agreed in advance that we would split any costs associated with that particular witness. So the fact that they made a strategic decision to cancel that deposition on the, you know, literally when counsel for plaintiff showed up at Faegre & Benson was about when they found out about this, we feel like our folks wouldn't have been there at all, because, taking them at their word, and I'm not disputing that these other witnesses ended up just

bailing for various reasons, but we wouldn't have been there in the first place and we would have at least had Dr. Harper, whom we've now learned is working with 3M on this robust randomized trial that they're talking about now.

THE COURT: So is it the plaintiffs' position that there's something untoward or nefarious about these witnesses who presumably before now were just thought to be scholars who were doing their thing and publishing these articles and now are retained by 3M to do studies for 3M? Is there something wrong with that or is that allowed?

MS. CONLIN: I think that knowing that now, it would have been very helpful to have an opportunity to depose Dr. Harper about what the relationship is and what he's up to, and we didn't have that ability because of what happened. So I'm not going to cast aspersions or suggest that there's anything nefarious going on, I don't know, but certainly the fact that people flew over and were prepared to depose this doctor about what a -- a study on the Bair Hugger is important to us.

THE COURT: And is there -- it's my understanding if, as I'm not sure I'm reading it correctly, but if I am reading your stipulation correctly, it is that at least these other three depositions are now going to be rescheduled pursuant to letters rogatory as opposed to them showing up voluntarily. Is that correct?

MS. CONLIN: Well, yes and no. With respect to Dr. Reed, we haven't communicated with him. We've got the communication from 3M that he's retained counsel and has said he's not going to go forward voluntarily so that's going to go through the letters rogatory.

Dr. Harper, I don't know if he's willing to reappear or not. 3M has now said they don't intend to reschedule his deposition.

With respect to Dr. Dasari, he's the doctor from Australia who had indicated that he was willing to appear voluntarily and then, you know, was in the U.K. at the time of these depositions and had apparently some child care issues, so it may be that we have to go through letters rogatory with him as well.

I'm not particularly sanguine on the outcome of the letters rogatory process and whether a court in England is going to order anyone to appear, which is why the fact that the Dr. Harper deposition was strategically canceled is particularly problematic.

THE COURT: Okay. Who wants to speak to this?

MR. COREY GORDON: Thank you, Your Honor. First of all, I want to make a couple of things really clear. The only deposition we canceled was Dr. Harper, and I'll explain the circumstances behind that, because I think it's important to understand that the word "strategic" sounds

like we, you know, devious and calculating ah, ha, ha, ha, we got them over to England, now we'll cancel it, but that wasn't the case at all. But the more important thing is that the other three depositions, they were voluntary witnesses. We had no way of forcing them to abide by their agreement to show up.

THE COURT: Yeah, but I guess my curiosity is what did you tell them in the first place and why do you think they changed their mind? Do they know that the purpose of a deposition is for lawyers to sort of rip into them or did they think that they were just going to have a high-level conversation about the importance of their work?

MR. COREY GORDON: No, we explained that the -- there was litigation in the United States; that the study or studies that they had been coauthors on were important -- were being relied upon as underlying scientific evidence in these cases; that lawyers from both sides, the -- they call them claimants, we call them plaintiffs, the plaintiffs and the defendants both wanted to ask questions about the studies, the underlying data, the methodology, and I think we -- you know, we also communicated that we wanted any communications that they might have had with Dr. Augustine or his companies regarding the studies, so they were -- they knew, generally, what it was we were expecting to examine them about.

And I learned a new word. I was totally gob-smacked when the other three witnesses just canceled, particularly Dr. Reed who on Friday -- or Thursday evening sent me an e-mail at about 8:00 p.m. London time saying, just, you know, confirming 9:00 a.m. Saturday at the Faegre Baker Daniels offices, 7 Pilgrim Street, you know, here, these are my rates, and I confirmed it. I cc'ed the plaintiffs too, and I think I cc'd the plaintiffs, but in any event, Thursday evening he's confirming it. Friday noon, the solicitor in the Faegre office in London, gets notified by lawyers who had previously surfaced for one of the other study authors we had sought a voluntary appearance but he declined, they said we're now representing Dr. Reed and he's not showing up for deposition. Wow, okay. We -- I -- we immediately let --

THE COURT: Were you in London at the time?

MR. COREY GORDON: Yeah, I was sitting in a hotel surrounded by boxes of documents getting prepared to take these depositions. So my God, we lost Reed. Then, I get an e-mail from Faegre's, I'm refer to him by his name, Stephen Llewellyn is the solicitor in the Faegre office in London, he said I just got a -- I can't remember a call or an e-mail, from Dr. Dasari who said he may have some child care problems, he's trying to work it out. Again, we let the plaintiffs know, just FYI, Dasari is saying he's got

potential child care issues. Friday, Friday late afternoon, Dasari is out.

McGovern is a little bit different because we -- and by "we," I mean both the plaintiffs and us -- had been in ongoing negotiations with his solicitor about compensation for him and the solicitor, and we went over there with the understanding that they had blocked out the 22nd of September and they were -- we went over there with the expectation that there's a pretty good chance we'll work out the details and the fees and we'll go forward with that, but we also knew that there was -- there was a fair chance that they would say -- or that we would end up not being able to work out an agreement in time to do September 22nd, and that's what happened, and that actually happened fairly early on.

We're still negotiating with Dr. McGovern's solicitors. We still are optimistic that we will get to take his deposition voluntarily, although I have to tell you at this point I want to see something in writing with some sort of a liquidated damages clause before I want to -- before I get on a plane and fly over there to take another voluntary witness.

But the point is that both sides went over there expecting to take four depositions -- at least three depositions, knowing that McGovern was a possible but not a

certain and there was a fair chance that we weren't going to do McGovern on this run. And when Reed and Dasari collapsed on us, it was just -- it was, as I say, I was gob-smacked. It was very frustrating to travel over there.

And I -- I understand plaintiffs' frustration. I want to -- so but they're kind of lumping this all together, and I don't really think that the -- that Ms. Conlin was meaning to say that if we had said we're not going to do -- we're not going to do Harper but we're -- we're still going to go forward with Reed and Dasari and McGovern, I don't think she's really saying that their folks wouldn't have been over there at all. I suspect they would have been over there for those three depositions but they just wouldn't have come two days earlier. And I think that's -- that point is fair. You know, under Rule 30(g), you know, we didn't give timely notice. You know, we -- we take responsibility for that. We canceled Harper the night before, and had we canceled him --

THE COURT: What was the -- I'm sorry, I might have just missed it, why did we cancel Harper?

MR. COREY GORDON: I haven't -- you didn't miss it.

THE COURT: You haven't gotten there yet.

MR. COREY GORDON: I haven't told you yet. What I'm doing is I'm conceding that our cancelation of Harper

the night before resulted in them being in England two days earlier than they would have otherwise been. But I -- I really don't think that the plaintiffs are taking the position that the only reason they flew over there was Harper and that if we were just doing Reed and Dasari and McGovern they would have stayed in the United States, but I'll let them address that. But the point is yes, we canceled Dasari -- excuse me, Harper.

THE COURT: Harper.

MR. COREY GORDON: Harper canceled the night before. Here's why. The only reason we were taking Harper is he was a coauthor with Dasari and Mark Albrecht, he's a U.S.-based person, an Augustine employee, he's a coauthor on six of the eight studies at issue. Harper is only a coauthor on this one study along with Dasari. And it's, frankly, in the greater scheme of things, it's a pretty insignificant study. There's some interesting aspects to it. The only reason we were taking Harper's deposition is because he -- he was -- I think he was the first one, he or another doctor who then did back out well before we went over there, said yeah, I'll make myself available for deposition. So Harper was -- Harper said he'd -- he'd show up, you know, if we paid him his fees so we'll ask him -- we'll go and ask him the questions about his studies.

He also produced some -- he produced the

underlying data for this study, which was really important, and that was really more important almost than his deposition. But in the process of preparing for the deposition, and, as I was in England, I was able to talk to some of the U.K. 3M people, just to get a better understanding of, frankly, the national health service or the national health system in England, and it just -- it was almost a casual conversation, there was some mention about how Harper had expressed some interest in getting some funding for a study that he was doing.

I hadn't heard anything about it. I contacted people in the United States. We weren't aware of it. So we -- we scrambled in a matter of hours to find out what is this about. And yeah, it turns out that a couple of -- I think sometime in May, Dr. Harper had approached a 3M salesperson at a conference in Europe and said I'm involved and we're thinking about doing this study that will really look prospectively at, you know, comparing forced air warming to resistible blankets and infection rate, might 3M have any interest in helping to support this study, helping to provide funds for it, and the person he talked to handed him off, if you will, to the various powers that be. And there's a whole research group within 3M that funds lots of research, and that group took control, if you will, and was -- and it wasn't Dr. Harper who was -- who became the

prime person, it was another professor at the University of Oxford who became the principal investigator, and 3M agreed to, yeah, we'll provide some funding for the pilot study, not for the larger study that this was going forward on, but this is an investigator-initiated, institution controlled study as opposed to a study that 3M is funding or -- so I want to make it clear, we -- 3M has not retained Dr. Harper or any of the other investigators, just 3M has agreed to participate --

THE COURT: But why does all of that compel the cancelation of the deposition?

MR. COREY GORDON: Okay. Here's the dilemma with which I was faced. This -- I literally found this out Wednesday night or -- Tuesday night before the Wednesday deposition. And it -- and the timing, I was literally finding this out while you were having a conference call with the parties on the confidentiality issues. So I found this out, and I was going, trying to say, well, what documents do we have, and people back here were scrambling to see if we could quickly find documents that would relate to this. And, you know, there wasn't much that we came up instantly, but we came up with a couple communications, and we were like, okay, should we just, you know, turn what we have over to the plaintiffs this evening and, you know, go take the deposition or, you know, do we -- I -- I was in

a -- I was in a damned if you do, damned if you don't. If we went forward with that deposition and they didn't have all the documents, which we -- which I didn't have, which no one here had seen, they would have had legitimately a complaint that, you know, how can they participate in this deposition without the full documents? So that was -- that was one factor.

Then I'm thinking -- and part of the -- my thought process too was, okay, well, we -- really my only interest in Dr. Harper was this particular study. He had provided us with his underlying data, and, hey, he's -- his coauthors, Dr. Dasari, Mr. Albrecht, they're coming up for deposition, and Dasari's case, he, you know, we're deposing him in three days, got the data. My -- my prep for Harper was identical to my prep for Dasari. It's only the one study. So, you know, I was prepared. So Harper isn't that big of a deal in the greater scheme of things. Got his data, I can ask all the questions about this study with Dr. Dasari, partly why I was so disappointed about Dr. Dasari's failure to appear.

But then we were, the third author, it was Dr. -- or Mr. Albrecht, we're deposing him tomorrow, hopefully we'll get some information out of him, but in the meantime, and it is a good thing that we did this, when we decided, you know what, the better course of action here is to just cancel the Harper deposition, now, I -- you know

what, we could have gone forward and taken his deposition, you know, just limited it to questions about the study and we wouldn't be here arguing about costs, but they would have seen the documents and then I would have been -- that -- that would have been kind of a slimy thing to do. I didn't have the documents. I literally didn't -- and no one was able to pull them together fast enough before the deposition.

And it is remarkably good that we did because what we discovered then on Friday, the day after his deposition was scheduled, in the week before, the principal investigator, this professor at Oxford, had added to the list of investigators that he wanted to use Mike Reed. So at that point we still thought Reed was going to be a deponent, so we quickly got that documents over to the plaintiffs and said, hey, this -- now you know everything we know, literally, but then within minutes, I think less than an hour, Dr. Reed had canceled so that one went away. But the point is --

THE COURT: So let me ask this about the ones that canceled for child care. They knew that there was like four lawyers coming from the United States to take their deposition and he hadn't made arrangements to have somebody take care of his kid?

MR. HULSE: I would love to know what really

happened. I mean, it -- I -- I'll be candid with the court, my -- my suspicion antenna was quivering. I don't know what happened. But when Reed sends me an e-mail on Thursday night, you know, just confirming everything and less than 12 hours later he's lawyered up and the same lawyers that now represent Dr. Leaper and Dr. Hamer, all opposing the letters rogatory, well, what's the deal here, and, you know, it's a close -- it's a small community. This group of people who do the -- that kind of research, they -- they are in close contact with each other. I don't know who talked to whom, what the story was. And I don't want to -- I mean, I -- I don't want to engage in conspiracy theories, but it was pretty remarkable that it suddenly collapsed.

And by the way, this is a news flash, I guess. We just heard this afternoon that the senior master in the high court of London who hears the letters rogatory issues has set a hearing for November 8th on our letters rogatory. We're told it's very unusual for them to -- for the court to actually have a hearing at all, it's ordinarily all done on paper, so the fact that there is going to be a hearing.

THE COURT: And that hearing, are these letters rogatory now are for the other three witnesses for --

MR. COREY GORDON: They're not for Dasari because Dasari lives in Australia. They are for McGovern, although we're still trying to work things out with McGovern, Hamer

who had originally said he -- he would show up and then awhile ago said no, Legg, a coauthor with Hamer, Reed, and Dr. -- did I say Leaper?

MR. BEN GORDON: Leaper, yeah. No, you didn't.

MR. COREY GORDON: Now I said it.

MR. BEN GORDON: Now you said it.

MR. COREY GORDON: Okay. At my age, I get --

THE COURT: That was five.

MR. COREY GORDON: Yes, so those five.

THE COURT: Okay. All right. Anything else?

MR. COREY GORDON: No, I just -- but I just want to point out we, you know, it -- we take responsibility for them being over there two days earlier. I was going to do them all by myself. They sent two lawyers. Okay, that's -- they sent two. 3M offered -- has offered to pay the travel expenses a -- one fourth of the travel, the food, the lodging expenses for both the lawyers for the whole time, and we submit that that, under the circumstances, is more than reasonable. Thank you, Your Honor.

THE COURT: Okay.

MS. CONLIN: Briefly, Your Honor, just a couple of points. And I think Mr. Gordon made it clear, my point to the Court was that our group would not have been in London on Tuesday. They wouldn't have been in London until Friday. By Friday, the other ones were canceled so the trip over

there wouldn't have happened but for the cancelation of Dr. Harper.

If you look at the stipulation on page 4 --

THE COURT: And when would you have gone?

MS. CONLIN: They went the day before.

THE COURT: Putting aside Dr. Harper's deposition, when would you have gone?

MS. CONLIN: So they came in Tuesday for a Wednesday deposition, so just assuming, it's a hypothetical, assuming that they would have come in on Friday for the Saturday depositions.

THE COURT: So let's get these days straight, by the way, because my recollection is the days are different, so in the stipulation Dr. Harper was scheduled for September 15th, correct? September 15th is a Thursday, right?

MS. CONLIN: Right.

THE COURT: So you came in on Tuesday for a Thursday deposition? Is that a correct statement?

MS. CONLIN: They came in Tuesday night, landed in London Wednesday morning, Wednesday noon.

THE COURT: Okay. And if Dr. Harper's deposition had not been scheduled and the first deposition was --

MS. CONLIN: Saturday.

THE COURT: Dr. Whoever, Dr. Reed on the 17th,

which is Saturday, you would have left here at 9:10 on Thursday night and arrived in London on Friday morning?

MS. CONLIN: Correct.

THE COURT: But the depositions for Saturday weren't canceled until Friday afternoon London time. Is that correct or incorrect?

MS. ZIMMERMAN: I think that's right, Your Honor. We would have stepped off the plane to receive the e-mails.

MS. CONLIN: Fair enough.

THE COURT: Okay.

MS. CONLIN: The other point I wanted to make is if you look at page 4 of the stipulation, the 3M has said that they learned on Thursday, September 15th based on a document September 9th that Harper and Reed were involved in the new study. My only point is this. They -- they canceled Dr. Harper because they determined he wasn't important, but we went into this with an expectation that regardless of what they felt, there were questions we wanted to answer him -- or ask him, and that's why we were willing to split the time and split the costs on it. They unilaterally took that away from us. If they were concerned because Dr. Harper and Dr. Reed had surfaced in this new study, they were fully prepared to go forward with the deposition of Dr. Harper -- I mean Dr. Reed. They didn't cancel Dr. Harper and Dr. Reed. They canceled Harper.

Dr. Reed is the one who pulled out of the other one. So I don't think that that makes sense that they felt like they needed to cancel Dr. Harper because these -- because this new information, because Dr. Reed is in the new study as well.

THE COURT: And I'm taking it, if I'm reading this stipulation correctly and hearing your argument correctly, plaintiffs' lawyers have had no communication with the individual witnesses?

MS. CONLIN: That's correct, Your Honor.

THE COURT: So you have no more insight into this child care issue than anybody else?

MS. ZIMMERMAN: We do not. We have not talked with any of these third-party witnesses in advance of their depositions. We have been, after Harper was canceled, we sent an e-mail asking if he canceled or who canceled, and that's when we got the e-mail saying we would have to contact defense counsel to get to the bottom of that.

MS. CONLIN: I was going to say we did reach out to Dr. Harper to say can you illuminate for us, would not accept a call from us, said you'll have to talk to 3M to get to the bottom of it.

The other exception that, as Mr. Gordon talked about, with respect to Dr. McGovern who has lawyers, we have been on, most recently, on a phone call with counsel for 3M

and us talking to Dr. McGovern's lawyers trying to negotiate something on that, but we -- again, that was with the lawyer and not with the individual witnesses.

THE COURT: All right. All right. Well, I guess my view of these London depositions is it's not a foregone conclusion that they're not going to happen, so it would seem to me to be premature to order that anybody pay costs and/or pay attorneys' fees incurred in preparing for depositions.

The travel to London appears, to me, is something that should be compensated to some degree. As I understand it, 3M has volunteered to cover one quarter of the travel expenses for the two lawyers that were there. It would appear, to me, that fairness would dictate that 3M pay for, I don't know if this works out mathematically the same or different because my brain doesn't work that way, but that 3M cover the entire travel expenses for one lawyer and that as the other -- as the depositions may well be taken, that the preparation is not all wasted and therefore there's no need for 3M to pay the attorney's fees associated with the depositions.

Does that make sense? No? Everybody's looking at me sceptically.

MS. CONLIN: I understand, Your Honor.

THE COURT: Okay.

MR. COREY GORDON: Sure. Oh, yes.

THE COURT: Anything else on any of these issues that anybody wants to bring to my attention?

And I guess to just to make sure I'm clear on what I'm planning, I'm going to be -- there will be minutes that will summarize what I've said. Those things that I have offered opinions on is I would assume the lawyers will either do what I said or not as they choose, but if they don't that they will take some formal action to get some formal ruling from the Court on those things that you're not going to following my advice on.

MR. HULSE: Yes. That's understood.

MR. BEN GORDON: Your Honor, could we ask -- sorry. Could we ask that -- and understanding that this is in that capacity you just expressed, if these depositions for any reason do not go forward, could we ask that the Court re-entertain our request for fees associated with preparing for the depositions?

THE COURT: We will cross that bridge when we get to it.

MR. BEN GORDON: Okay.

THE COURT: Anything else for 3M?

MR. HULSE: No, Your Honor.

THE COURT: Anything else for plaintiff?

MS. ZIMMERMAN: No, thank you.

THE COURT: Okay. Thank you all for coming. We are in recess.

MR. HULSE: Thank you for your time.

MR. BEN GORDON: See you next week. Thank you.

(Proceedings concluded at 3:07 p.m.)

* * *

I, Staci A. Heichert, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Staci A. Heichert*

Staci A. Heichert,
RDR, CRR, CRC